The case for supermajority requirements in referendums

Matt Qvortrup[*] and Leah Trueblood[**]

Referendums appear to be the most majoritarian of democratic processes. The simplicity and equality they offer through voting look like the essence of majoritarianism. Indeed, this simplicity and equality are often argued to be central to referendums' appeal. This article argues that this appearance of majoritarianism is misleading. Paradoxically, without supermajority requirements, binding referendums on constitutional issues cannot offer the simplicity and equality majoritarianism requires. This article identifies three different types of majority requirements and where and when these requirements are used worldwide. It then demonstrates why, at least for binding referendums on constitutional questions, special majority requirements are necessary to maintain the principles of majoritarianism. It shows that there is always a case for turnout thresholds in referendums and further special majority requirements depending on the context. Finally, the article argues that the case for special majority requirements can be context-dependent without collapsing into indeterminacy.

1. Introduction

Referendums may appear, at first glance, to be the most majoritarian of democratic processes.[1] The simplicity and equality they offer through voting—everyone gets one vote on one issue—looks like the essence of majoritarianism. Indeed, the simplicity and equality of bare majoritarianism are often argued to be central to referendums' appeal. This article argues that, at least with respect to one kind of referendum, this appearance is misleading. In binding referendums on constitutional issues, referendums cannot establish the equality majoritarianism requires without supermajority

[*] Professor of Political Science and International Relations, Coventry University, Coventry, United Kingdom. Email: drqvortrup@gmail.com.
[**] Career Development Fellow in Public Law, Worcester College, Oxford University, Oxford, United Kingdom. Email: leah.trueblood@law.ox.ac.uk. Thank you to the members of Oxford's Legal Philosophy reading group for helpful comments on a previous draft of this article. Thank you as well to the British Academy for their financial support, by means of grant no. PF19/100114, for this research. Any remaining errors are the authors' responsibility.

[1] Referendum is an umbrella term capturing a range of "votes on matters of policy." Maija Setälä, Referendums and Democratic Government 4 (1999). This article is concerned only with binding referendums concerning fundamental constitutional questions.

requirements. This means there is always a case for turnout thresholds, as well as context-dependent reasons to use further special majority requirements as well. These turnout thresholds, plus additional special majority requirements, amount to requiring supermajorities for binding referendums on constitutional change. Taking this approach runs counter to the authoritative guidance of the Venice Commission on Referendums, and both the Commission's recommendations and rationales are challenged here.

This article begins descriptively. It starts by outlining three different kinds of special majority requirements and when and where they are used around the world. It also explains the meaning of 50%+1 majoritarianism, as well and its popularity and rationale. The article then turns normative. It argues that turnout requirements, supported by further special majority requirements, are necessary to maintain majoritarianism. Without such requirements, referendum outcomes are not neutral concerning outcomes, which majoritarianism requires. The article argues for the necessity of turnout thresholds, and then why other special majority requirements are likely to be necessary and in which contexts. The proposals here challenge the authoritative guidance of the Venice Commission on Referendums, which specifically advises against special majority requirements.[2] While it is right to say majoritarianism is an essential feature for successful referendums, one person one vote—with no other protections in place—cannot satisfy majoritarianism's necessary and sufficient conditions. Both the majoritarian and countermajoritarian parts of referendums are necessary to maintain equality, and consequently to establish their democratic legitimacy. The final substantive section anticipates Schwartzberg's objection that super majorities are indefensible because they are indeterminate. If 60 + 1 is required, she argues, why not 70 + 1, or 80 + 1? The reply offered here is that the case for such requirements can be context-dependent without collapsing altogether.

2. What are special majority, and super majority, requirements?

The idea, and normative force, of majoritarianism is central to the project of self-government. Alexander Hamilton said it is "the fundamental maxim of republican government" that "the sense of the majority should prevail."[3] The principle of majoritarianism is often argued to be "axiomatic" for, or "inherent" in, democracy.[4] A widespread account of what a majority entails is that of a bare majority:[5] which means more votes for a proposition than against.[6] Around the world, however, a range of approaches to majority requirements are employed in referendums. Table 1 illustrates

[2] Venice Comm'n, Code of Good Practice on Referendums, pts. III.7(a), III.7(b), CDL-AD(2007)008rev-cor (2018) [hereinafter Code of Good Practice on Referendums].

[3] The Federalist, No. 22, at 193 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[4] Eerik Lagerspetz, Social Choice and Democratic Values 18 (2015).

[5] Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, in Political Political Theory 246, 247 (2016).

[6] "Only by reference to the numbers favoring one side rather than another." Albert Weale, *Three Types of Majority Rule*, 90 Pol. Q. 62, 65 (2019).

Table 1. Three kinds of special majority requirements used around the world

Types of requirements	Examples
Double majority requirements	Switzerland: "1. Proposals that are submitted to the vote of the People are accepted if a majority of those who vote approve them. 2. Proposals that are submitted to the vote of the People and Cantons are accepted if a majority of those who vote and a majority of the Cantons approve them. 3. The result of a popular vote in a Canton determines the vote of the Canton . . ."[a]
	Australia: "A majority of the States . . . and a majority of electors voting also approve the proposed law." The two votes in question being "simultaneous elections for the House of Representatives and the Senate (1977) and a similar proposal in 1984."[b]
Supermajority	Montenegro in 2006: "For the referendum to be declared validated, turnout must, in accordance with Montenegrin electoral law, be over 50% of those on electoral lists. Also, independence must be approved by at least 55% of voters."[c]
	Italy: "The proposal submitted to referendum shall be approved if a majority of those eligible have participated in the voting, and if it has received a majority of valid votes."[d]
Turnout requirements	Denmark for Constitutional Change: " Subsection 5 . . . Voters must vote for or against the Bill. And the Bill will only be rejected if a majority votes against it. This majority must consist of at least 30 per cent of all voters. Invalid votes do not count."[e]
	Lithuania: "A mandatory referendum shall be deemed having taken place, if over one half of the citizens, having the right to vote and having been registered in voter lists, have taken part in it." "A consultative (deliberative) referendum shall be deemed as having taken place if over one half of the citizens, who are eligible and have been registered in voter lists, have taken part in it."[f]
	Portugal: "Referenda shall only be binding in the event that the number of voters exceeds half the number of registered electors."[g]

[a] The Cantons of Obwalden, Nidwalden, Basel-Stadt, Basel-Landschaft, Appenzell Ausserrhoden, and Appenzell Innerrhoden each have half a cantonal vote. Constitution fédérale [Cst] [Constitution] Apr. 18, 1999, RO 101, art. 142 (Switz.).

[b] *Australian Constitution* s 128.

[c] Corinne Deloy, *Referendum on Independence in Montenegro*, Fond. Robert Schuman: Res. & Stud. Ctr. on Eur. (May 21, 2006), www.robert-schuman.eu/en/eem/0520-referendum-on-independence-in-montenegro-21st-may-2006.

[d] This is only for popular referendums, however, not constitutional referendums. Art. 75(4) Constituzione (It.)

[e] Constitution Act, art. 42 (1953) (Den.).

[f] Law on Referendums arts. 7(1), 8(1) (2002) (Lith.)

[g] *See* Constituição da República Portuguesa [Constitution] art. 115 (11) (Port.) (requiring a 50% turnout, but only for a referendum to be binding.

three different ways that majority requirements are used in referendums around the world.

Despite these many different thresholds used around the world, the idea of a majority as 50%+1, or a bare majority, remains dominant in thinking about referendums

and—as seen below—is the approach advocated by the Venice Commission. This article argues that referendums on binding constitutional issues require both threshold referendums and further special majority requirements, depending on the context. This amounts to requiring supermajorities for constitutional change. Bare 50%+1 majorities are not enough. This is because binding referendums on constitutional issues present challenges and opportunities for maintaining equality in a democracy that are distinct from elections. Before turning to the case for turnout and additional special majority requirements, it is necessary to anticipate the case against such requirements. Why is bare, 50%+1 majoritarianism so powerful in the first place?

3. The case for 50%+1 majoritarianism

The case for special majority requirements is, ironically, the minority view. Special majority requirements are not considered necessary, for example, in maintaining a deliberative environment in referendums.[7] Concerns against special majority requirements are driven both by arguments of practicality and arguments of principle. On a practical basis, the worry with special majority requirements is that there will never be enough support for policy and constitutional change. Achieving a higher degree of consensus may be desirable in minimal circumstances, but generally, its approach is too slow and too burdensome.[8] The arguments of principle for 50%+1 include that voters should have the option not to vote or participate,[9] and that special majority requirements weigh some votes more heavily than others, thus undermining equality.[10] The case against special majority requirements is not only made conceptually; it is also practical international guidance. The authoritative Venice Commission guidelines on the use of referendums from the Council of Europe explicitly advise against special majority requirements. The Commission says it is advisable not to provide for:

a. a turnout quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no;
b. an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold.[11]

[7] In his compelling and comprehensive account of the deliberative conditions necessary for referendums, Tierney does not make a case for special majority requirements. Stephen Tierney, Constitutional Referendums: The Theory and Practice of Republican Deliberation (2012).

[8] Elizabeth F. Maher, *When a Majority Does Not Rule: How Supermajority Requirements on Voter Initiatives Distort Elections and Deny Equal Protection*, 15 Geo. Mason L. Rev. 1081 (2008).

[9] Or, more accurately, a claim right against not being required to vote. Ben Saunders, *A Further Defence of the Right Not to Vote*, 24 Res Publica 93, 93 (2018).

[10] Maher, *supra* note 8.

[11] Code of Good Practice on Referendums, *supra* note 2, pts. III.7(a), III.7(b).

It is helpful that the Venice Commission embeds the reasoning behind these two recommendations in their guidance, but neither of these recommendations nor their rationales are correct. Take point (a) first. It is not necessarily the case that turnout requirements assimilate voters who abstain with those who vote no. It is unclear what the Commission means by assimilating, but the idea seems to be something like: it has the same effect or is interpreted to have the same meaning.[12] However, abstentions do not have the same effect, and they are not interpreted to have the same meaning. An outcome that fails has a different political impact from that which is voted down. While abstention votes might sometimes have the effect of no votes, it is too quick to say that a turnout quorum *necessarily* assimilates no votes with abstentions. In one narrow sense, it may be correct to say that outcomes assimilate no votes with abstentions in circumstances of turnout thresholds. This narrower basis holds only insofar as both no votes and abstentions decline to offer active support for outcomes. There are two essential points to make about this. First, this can be true of processes with and without voter turnout thresholds as well. Second, assimilation, in this sense, is not always problematic. Irrespective of whether there are turnout thresholds, in one sense it is right to ask of a referendum, particularly a binding question of constitutional change: was there enough *active* support for this proposal, yes or no? The fact that voters did not vote for a proposal is not conclusive, but it still has meaning. The fact that voters decided not to cast their ballots for a proposition is essential in evaluating a referendum outcome and legitimacy. This clarity is especially true in referendum boycotts, as in Northern Ireland in 1973, where almost 99% of the Nationalist community refused to vote[13] and similarly in Crimea in 2014.[14]

Turn now to the Venice Commission's point (b), the concern that difficult political situations can arise if simple majority support for a proposition does not meet a higher majority threshold. Indeed, a complex political situation may arise if 50%+1 support a referendum outcome but a threshold or special majority requirement is not satisfied. Given the many types of constitutional chaos caused by referendums, however, the situations where special majority requirements are not satisfied are manageable. These kinds of circumstances did occur, as with electoral reform in British Columbia in 2003.[15] Indeed, the fact that a majority of Australian referendums have failed—only five out of twenty-four since 1945 have been carried—has often been blamed on the double majority requirement.[16] This is, however, mistaken. In Australia, only

[12] It may also be that the Venice Commission is concerned about equality and voting, and not all votes being weighted equally. Section 3 of this article considers this concern in detail.

[13] Const. Comm., Report, Referendums in the United Kingdom 6 (Mar. 17, 2010), https://publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/9902.htm.

[14] Anne Peters, *The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*, 100 Nomos 278, 279 (2014).

[15] In a 2005 referendum on electoral reform in the Canadian province of British Columbia and a similar referendum in 2007 in Ontario, the enabling legislation held that 60% of the total votes cast had to support the proposal for the reforms to be approved. The law also specified that the proposal had to obtain a majority in 60% of the voting constituencies. Thus, even though 57% of voters in British Columbia supported the proposed change, it was deemed to have failed.

[16] George Williams & David Hume, People Power: The History and Future of the Australian Referendum 267 (2010).

two of the referendums have failed as a result of the provision in Article 128 of the Constitution stipulating that the constitutional reform requires that "a majority of the States. . . and a majority of electors voting also approve the proposed law."[17] The two votes in question were "simultaneous elections for the House of Representatives and the Senate in 1977, and a similar proposal in 1984".[18] In Switzerland, similarly, very few referendums have failed due to the double majority requirement.[19] Out of an astounding 413 referendums held between 1866 and 2015, 228 resulted in defeat, but only nine failed due to the *doppelte Mehrheit* requirement.[20]

None of this is to say that these referendum outcomes, where special majority requirements were not satisfied, are uncontroversial. The point, instead, is that these kinds of constitutional challenges are surmountable. These circumstances are also far less damaging than those where it is unclear what a majority means or when the meaning of a majority is contested. Disagreement about the meaning of a majority, or whether an outcome is too close to call, undermines the legitimacy of the whole referendum system and is a far more dangerous situation. Consider the fraught political debates around the Clarity Act in Canada on the question of what would count as a majority for Quebec's secession.[21] These kinds of cases where the meaning of a majority is at issue, particularly an issue ex post, are far more dangerous than those where the majority's meaning is identified and agreed upon but not satisfied. Of course, the Venice Commission is correct to say that special majority requirements are burdensome. The following section argues, however, that burdensomeness is not a bad thing. Indeed, binding referendums on constitutional issues have features that make burdensomeness—and consequently a supermajority requirement—necessary.

Before proceeding, one final point. Why is the case against special majority requirements in referendums so influential? Special majority requirements may be thought to make referendums more elitist. It might be thought that they are limiting the disruptive power of referendums and the people. Consider, for example, the argument from Rogoff, who, when writing about the Brexit referendum in 2016, argued that it was "lunacy" that there were no special majority requirements and 36% of eligible voters backed the case for Brexit.[22] The argument made here may be interpreted as aiming to remove the disruptive power of referendums to limit the power of elites. That is not the aim of this article. Indeed, the aim of the argument for special majority

[17] *Australian Constitution* s 128.

[18] Williams & Hume, *supra* note 16.

[19] While these failures of double-majority requirements are not identical to those of supermajority requirements in a unitary state, they nevertheless provide some indirect evidence that concerns about the burdensomeness of special majority requirements are overstated.

[20] Matt Qvortrup, *The Paradox of Direct Democracy and Elite Accommodation*, *in* Consociationalism and Power-Sharing in Europe: Arend Lijphart's Theory of Political Accommodation 177, 185 (2018).

[21] Patrick Monahan, *Doing the Rules: An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference* (Commissioned Reports and Studies, Paper No. 75, 2000), https://digitalcommons.osgoode.yorku.ca/reports/75.

[22] Kenneth Rogoff, *Britain's Democratic Failure*, Project Syndicate (2016), www.project-syndicate.org/commentary/brexit-democratic-failure-for-uk-by-kenneth-rogoff-2016-06.

requirements is to support the power of referendums, including their ability to check the actions of representatives. One of the tragedies of Brexit is the deep contestation of the meaning and legitimacy of a referendum itself. Tragic too is the legal contestation of whether the United Kingdom's devolution settlement entailed a geographic special majority requirement, therefore creating a double majority requirement to secure the consent of the devolved regions.[23] A benefit of special majority requirements is putting the meaning of an outcome beyond doubt and then allowing the power of majoritarianism to take effect. Given the concerns raised about the Brexit referendum in the form of campaign financing,[24] and the inchoate nature of the question, having special majority requirements could have made the referendum on leaving the European Union more authoritative and effective. It could have helped avoid years of political wrangling. That is not to say that special majority requirements are a panacea, or it is obvious what would have happened in the Brexit referendum with them. Essentially, the point is only there is nothing antimajoritarian or antidemocratic about special majority requirements. The aim of arguing for special majority requirements is not to limit the disruptive power of referendums. It is only to advocate an alternative meaning of what should count as a majority for circumstances of referendums on constitutional change. The remainder of the article argues that turnout thresholds are always defensible for binding referendums on constitutional change, and further special majority requirements—such as double majority requirements in federal systems—are likely to be required depending on the context.

4. What majoritarianism requires

The idea of majoritarianism is connected to the idea of democracy. Indeed, Weale thinks that "to be a democrat is to be a majoritarian."[25] The case for majoritarianism is intuitive. Weale puts it like this: "democracy implies political equality, and political equality implies majority rule".[26] Likewise, for Waldron, while majoritarianism[27] is imperfect,[28] it remains the best way to give effect to the connected principles of equality and self-determination.[29] Like Weale, Waldron thinks that majoritarianism is "according equal weight or equal potential decisiveness to individual votes [as] a way

[23] *See* Miller I. Miller v. Secretary of State for Exiting the European Union, [2016] EWHC 2768, [126]–[152] (Admin) (where the second question, on the Sewel convention, raised the issue of double majority, and whether the consent of the devolved regions was necessary). The Scotland Act 2016, § 28(8) (U.K.) [hereinafter Sewel Convention].

[24] Ruth Green, *Brexit and Electoral Law: Campaign Spending Controversies Highlight Pressing Need for Reform*, Int'l Bar Ass'n, www.ibanet.org/article/5972B95C-AC35-4949-A5AA-9C8A1446497E (last visited May 14, 2021).

[25] Weale, *supra* note 6, at 64.

[26] Albert Weale, The Will of the People: A Modern Myth 49 (2018).

[27] It is necessary to note that Waldron is making a case for majoritarianism in the context of legislation, not referendums, but the same principles still apply.

[28] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1372 (2006).

[29] *Id.* at 1374.

of respecting persons."[30] The benefit of this equality and simplicity of majority voting is that, as Weale says, it is impartial as to individuals and alternatives.[31] That is to say: it does not give any form of preference to one outcome in a referendum over another.

The core of the case against special majority requirements is that they undermine the equality that majoritarianism requires. As Weale argues, it is necessary that majoritarianism takes decisions "only by reference to the numbers favoring one side rather than another. . . [this] captures the principle of equality of participants."[32] This need for equality requires, Weale thinks, no bias towards the status quo.[33] Weale's worry here is the same as that of the Venice Commission outlined above: requiring a higher threshold to displace the status quo weighs one option more heavily than others, undermining the equality on which democracy—and majoritarianism—rely. Indeed, special majority requirements were struck down across American statutes on this basis. These requirements, such as 60% support for constitutional changes, were held to weigh some votes more heavily than others and consequently violate the equal protection clause.[34] This equality is thought to be significant, but it is also thought to be the source of other normative advantages of democracy, namely responsiveness and fairness.

The arguments outlined above raise a serious challenge for special majority requirements. Do special majority requirements undermine equality? The answer to this question depends, of course, on what is meant by equality. Even on the formal conception of equality adopted by 50%+1 majoritarianism, however, the next section will argue that voting is not neutral between outcomes. The political project of maintaining equality is different when considering fundamental constitutional questions through binding referendums.

5. Equality and special majority requirements

What does it mean to say that options are neutral as between outcomes? Is it right to say that a supermajority requirement of 60% support on a 50% turnout, say, undermines equality? Is that weighing some votes more heavily than others, and so treating voters unequally? This approach can weigh votes differently without undermining equality. This is because the conception of equality on which 50%+1 majoritarianism relies is too narrow for circumstances of binding constitutional change. What counts as equality is not the same as it is on policy change, which can be reversed by the next election. This section will show, first, when and why democracies weigh votes differently in order to maintain formal equality, before showing why those conditions are applicable to binding referendums on constitutional change. It will then employ arguments made by Waldron and Caviedes to challenge the use of bare majorities on

[30] Jeremy Waldron, Law and Disagreement 114 (1992).
[31] Constitution Act, art. 42 (1953) (Den.).
[32] Weale, *supra* note 6, at 65.
[33] *Id.*
[34] *Extraordinary Majority Requirements and the Equal Protection Clause*, 70 Colum. L. Rev. 486 (1970).

constitutional courts to demonstrate why binding constitutional referendums must be treated differently when determining what equality requires.

There are all kinds of good representational reasons that democracies weigh different votes differently. They do this when balancing different kinds of representation. The influence of representation by population and geography are the most notable examples, and this in turn may reflect challenges of protecting minorities, languages, and cultures. These considerations of weight are driven by the idea that even formal equality is not self-sustaining. Without these kinds of interventions, minorities of different kinds—geographic, religious, or linguistic, for example—do not have an equal, basic opportunity to participate in democracies or protect their rights. There are often good reasons, particularly in deeply divided societies, to require majorities of multiple constituencies for constitutional change. Such requirements do not undermine equality, they support it. The purpose of special majority, or supermajority, requirements in such circumstances is to ensure formal parity as between different political communities, even if those political communities are of different sizes.

The persuasiveness of the approach advocated here, of course, relies on the persuasiveness of its underlying conception of equality. As Beitz rightly says, 50%+1 bare majoritarianism is based on an "implausibly narrow" conception of equality.[35] Political equality, as Beitz rightly says, is about the standing of people in a community. To ensure equal standing, it might be necessary to depart from the approach of one person one vote. Beitz is right about this, and his arguments have special salience in circumstances of binding referendums on constitutional change. Beitz argues that "as the example of entrenched minorities illustrates, one's interests may be placed in jeopardy, even when power is equal."[36] This means that when processes are not only procedures for solving decisions, but decisions about decision-making procedures, the requirements of political equality are different.[37] The examples that Beitz uses to make this point are legislative districting and campaign finance, but this is even clearer in the case of binding referendums on constitutional issues. Such issues are not just about policy questions, which can be reversed or modified in the next election, they establish standing and establish the capacity to participate in political communities. Even if a constitutional issue is not about the rights of an entrenched minority, their equal standing to participate is still at stake in a constitutional referendum.

It is necessary to concede, however, that ensuring this equality of status or standing is a risky business. It raises the possibility of defending, for instance, an approach like Mill's, whereby the votes of graduates are weighed more heavily than those of non-graduates, on the basis that graduates can use the franchise to better effect.[38] These

[35] Charles Beitz, Political Equality 64 (1989).
[36] *Id.* at 111.
[37] *Id.* at 112.
[38] J.S. Mill, Considerations on Representative Government 179–80 (1991) ("[T]hough every one ought to have a voice—that every one should have an equal voice is a totally different proposition. . .. If, with equal virtue, one is superior to [another] in knowledge and intelligence—or if, with equal intelligence, one excels the other in virtue—the opinion, the judgment of the higher moral or intellectual being is worth more than that of the inferior: and if the institutions of the country virtually assert that they are of the same value, they assert a thing which is not").

kinds of objections can be avoided by connecting status to the kind of constitutional change at issue in a binding referendum. If a referendum sought to limit the rights or constitutional role of graduates, for instance, then there would indeed be a case for affording them special protections. This question of status, however, is linked to the constitutional change at stake. Everyone is bound by an entrenched constitution, there is always a case for turnout requirements to ensure consensus, and other special majority requirements—such as double-majority or consociational requirements—to maintain equality of standing or participation in a constitutional settlement.

Finally, arguments made by Waldron and Caviedes when challenging the use of judicial majorities in constitutional adjudication offer further incisive reasons to support the use of supermajorities. Waldron helpfully identifies a rule from the Supreme Court of Nebraska which creates a presumption of constitutionality, which is to say the majority must be greater than or equal to five-to-two to change the law. Waldron is right to interrogate the use of majorities on constitutional courts because, like binding referendums on constitutional issues, the requirements of equality are different here. They are different in circumstances where decisions can be overturned in the next election, unlike constitutional adjudication. Constitutional changes are entrenched in ways that can empower or limit rights of participation. Such changes also hold for future generations irrespective of whether those generations voted for them.[39] Further, such decisions are made without offering concessions on the losing side. Waldron rightly asks: "what do we offer the losers in 5-4 judicial decisions?"[40] The same question can be asked for the losing side of referendums. Because referendums happen occasionally, rather than periodically like elections, they do not offer the same kinds of opportunities for official opposition and disagreement. This all-or-nothing character of referendums, as the next section demonstrates, demands a different approach to equality than that which informs legislative politics. Such opportunities for disagreement are essential because, without a reason to support outcomes one disagrees with, the case for democracy collapses. In the absence of allowing disagreement, requiring special majority requirements can serve the same purpose by ensuring a higher level of agreement.

Requiring supermajorities on constitutional courts is also the approach used in North Dakota, Chile, Peru, Taiwan, and South Korea.[41] In these contexts, Caviedes argues, the case for 50%+1 majoritarianism is not made out based on equality. This is because judges are not acting as representatives. They are making technical decisions on the law itself based on their expertise. While Caviedes specifically clarifies that his argument does not apply to referendums,[42] the argument does translate in one way. The role voters take on when voting for a constitutional proposition is different than in voting for an ordinary proposition. In voting for a constitutional proposition, the consequences of their voting are entrenched—sometimes, as in the case of secession,

[39] *See* Jeff King, *The Democratic Case for a Written Constitution*, 72 Current Legal Prob. 1, 33 (2019).
[40] Waldron, *supra* note 5, at 24.
[41] Cristóbal Caviedes, *Is Majority Rule Justified in Constitutional Adjudication?*, 41 Oxford J. Legal Stud. 376, 377 (2021).
[42] *Id.* at 398.

irreversibly creating a new community. Caviedes argues that not treating judges as equal is defensible because in the context of constitutional adjudication getting the substantively correct outcome must be the primary value, and equality can only be secondary.[43] In the context of binding constitutional referendums, which use such deep methods of entrenchment, Caviedes's word "correct" should be taken to mean something like consensus. Given the outcome of a binding constitutional referendum will be deeply entrenched, an outcome should command the broadest possible public support. This question of consensus, to justify entrenchment, is the primary value when evaluating any voting procedure in a binding constitutional referendum.

To sum up this section: the requirements of basic equality are different in referendums on binding issues of constitutional change. What counts as equality is not the same as it is on policy change which can be reversed by the next election. This section first argued that democracies rightly and regularly weigh votes differently to maintain formal equality, particularly of geographical regions, before showing why those conditions are applicable to binding referendums on constitutional change. Referendums on binding constitutional issues are about status or standing, and Beitz rightly argues that maintaining equality of standing may require departing from the principle of one person one vote. This is to protect participation in political communities. The section then drew on arguments from Waldron and Caviedes, who challenge the use of bare majorities on constitutional courts, to demonstrate why constitutional issues must be treated differently when determining what equality requires. Waldron rightly asks what constitutional adjudication offers the losers, and this is true in constitutional referendums as well. Supermajority requirements offer those who do not agree with an outcome compelling reasons to nevertheless support it, thereby strengthening the democratic legitimacy of those outcomes. Further, Caviedes is also right to argue that judges in constitutional decisions are not like representatives in a legislature. Similarly, voting in a constitutional referendum is different than voting in an election. The entrenchment of constitutional referendums is such that voters are engaging in a different kind of reasoning about the establishment of a political community for future generations. This justifies evaluating voting procedures based on their ability to establish the greatest possible degree of consensus. In binding constitutional referendums, equality must be defined in terms of what is required to establish the same of status and standing, rather than in terms of 50%+1. Consider in more detail now what makes binding referendums on constitutional issues distinctive as democratic processes, and so justifies understanding equality differently.

6. The case for special majorities in referendums

Referendums are distinctive as democratic processes. They offer democratic benefits that are distinct from elections and, concomitantly, raise distinct challenges for democracies. The appeal of special majority requirements is that they offset some

[43] *Id.* at 400.

of the challenges of referendums without unduly increasing the risks. This section explains how two distinctive features of referendums mean that special majority requirements are necessary. Referendums are used in all kinds of ways, but they tend to be used to entrench laws in ways that are irreversible (Section 6.1) and all-or-nothing (Section 6.2). Special majorities can help to mitigate the challenges of referendums that follow from using them as irreversible and decisive means of entrenchment. This is not to say special majorities are a panacea for the challenges of referendums. Special majorities are only one requirement for successful referendums in the context of a broad framework of campaign regulation and healthy democratic culture.[44] Nevertheless, there are features of binding constitutional referendums that make special majority requirements necessary. These special majority requirements support both the practical aims and the normative bases of majoritarianism.

6.1. The irreversibility of referendums

Special majority requirements are essential for referendums because, unlike elections, referendums tend to be irreversible, at least in the medium-to-long term. They are meant to be the last word on a subject, at least for a while.[45] This presents challenges that are distinct from elections. Referendums may happen *repeatedly*, but they do not happen *periodically.* The repeated nature of elections builds an accountability mechanism into the process. If representatives do not keep their promises, they will not survive the next election. There is no such possibility with referendums. Special majority requirements are necessary to ensure that the irreversibility and decisiveness of referendums do not create a perfect democratic storm. The absence of accountability mechanisms, combined with the significance of content and the entrenched nature of outcomes, mean there are good reasons to think that minimal majority should be defined more expansively. Indeed, it would be internally contradictory to say that referendums should be irreversible and simultaneously argue that special majority requirements are unnecessary.

6.2. The all-or-nothing character of referendums

The second related reason that special majority requirements are essential for referendums is that referendums are all-or-nothing. Binding referendums on constitutional change are decisive. They are meant to bring an end to debates, at least in the medium term. In popular elections, minority or coalition governments are possible. It is possible that either one political party dominates one chamber, for instance, but not the other; or one party holds control over the executive but not the legislature. These mixed outcomes demonstrate that there is no clear consensus, and so that parties need to work together to manage disagreement. This is not true of binding

[44] "A vital democratic political culture is the essential background for a democratic referendum. . .." Tierney, *supra* note 7, at 302–3.

[45] Simone Chambers, *Constitutional Referendums and Democratic Deliberation*, *in* Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns 231, 251 (Matthew Mendelsohn & Andrew Parkin eds., 2001).

referendums on constitutional change. Even if a referendum question is not binary, its consequence is to conclude and entrench a political outcome in an all-or-nothing way. Ideally, proposals for constitutional reform will themselves do this, integrating alternative points of view. Even if a referendum does offer a compromise proposal, however, it cannot offer a compromise on the compromise. Votes are aggregated in an all-or-nothing way.

Special majority requirements are burdensome, but the need for burdensomeness follows from the forceful effects of binding referendums on constitutional change. These two features of the entrenchment of binding constitutional referendums, their irreversibility and all-or-nothing character, create distinctive democratic demands. Indeed, so distinctive are the challenges binding constitutional referendums on constitutional issues that they require understanding the requirements of equality differently. The next section shows how to put this alternative conception of equality into practice using threshold and other special majority requirements.

7. Employing threshold and special majority requirements to create supermajorities

This section makes two central recommendations for how to put special majority requirements into practice. While referendums are an enormously varied democratic process,[46] and so the appropriateness of different tools will vary, there are two key points. First, turnout requirements in referendums are always defensible. If referendums aim to identify that a majority of voters support a proposition, the referendum should establish such a majority. This is because of the higher level of consensus that constitutions require to justify entrenchment. Second, there are additional benefits to the use of special majority requirements in referendums in consocational democracies. In deeply divided societies, it is not enough to have a majority across the whole population. It is essential for the legitimacy of referendums that a majority is secured across communities. Consider each of these two recommendations for the use of special majority requirements in turn.

7.1. Turnout requirements

The advantages of turnout requirements significantly outweigh the disadvantages. There is nothing valuable to be lost by requiring turnout thresholds in referendums, and

[46] Indeed, many argue that there is little that can be said in general about referendums. Smith takes this view, arguing: "the 'referendum' label includes a variety of situations and usages which bear only a superficial similarity to one another." Gordon Smith, *The Functional Properties of the Referendum*, 4 Eur. J. Pol. Res. 1, 2 (1976). *See similarly* Pier Uleri, Introduction, *in* The Referendum Experience in Europe 1, 2 (Michael Gallagher & Pier Uleri eds., 1996), *citing* Arend Lijphart, Patterns of Democracy: Government Forms and Performance in Thirty-six Countries 206 (1984) ("Referendums fail to fit any clear universal pattern"). While it is important to concede that context is essential, there are general features of referendums because there are features of democracy, voting, and representation that hold in general. Not everything can be said about referendums in general. However, just as claims can be made about the regulation of elections, it is also productive to identify trends across the use of referendums.

there is much to be gained. The benefits of turnout requirements are both normative and practical. Consider now these different types of benefits in turn. There is a strong case both intrinsically and instrumentally that referendums should seek to establish the broadest possible public support for propositions. Instrumentally, referendums, as seen above, tend to be used for the most irreversible and decisive issues. These issues require broad public support to be defensibly addressed. Intrinsically, turnout requirements support the equality on which referendums are based. Maximation of participation is inherently positive.

In practice, turnout thresholds help to address issues with the use of referendums that are well-established. It has long been known that referendums are ways that elites achieve their goals.[47] It gives the executive an exceptional basis for action.[48] Turnout thresholds are practically useful because they make it more difficult for the executive to manipulate referendums. Even in healthy constitutional democracies,[49] but especially in unhealthy democracies,[50] referendums are used to bypass legislatures and representatives. Indeed, Zurcher argues that what was important about the use of the Nazi referendums was ending turnout requirements.[51] This created a dangerous combination of a popular mandate from an "unassailable source."[52] When the number of people supporting the proposals was far smaller than was required in the past, essentially, turnout thresholds are ways of forcing those making a case for representatives to engage with a broader range of voters. There may be some drawbacks to such an approach. It may be slower and more demanding to make constitutional and policy changes. These disadvantages are, however, far outweighed by the instrumental and intrinsic advantages.

7.2. Consociationalism

Referendums are often used on divisive questions in divided societies.[53] This creates a potential perfect storm where stakes are high, with significant and irreversible constitutional change a possibility, in a winner-takes-all scenario. Amaral contrasts

[47] M. Walker, The Strategic Use of Referendums: Power, Legitimacy, and Democracy 1 (2003) ("Political actors use referendums to achieve their goals").

[48] Carl Schmitt, Legality and Legitimacy 90 (Jeffrey Seitzer trans., Duke Univ. Press 2004) (1932) (advocating, instead, for a plebiscitary theory of democracy where voters acclaim a "government or some other authoritarian organ").

[49] Saskia Hollander, The Politics of Referendum Use in European Democracies 263 (2019) ("I show that referendums have above all been used strategically in inter and intra-party competition, especially in a context of rising fragmentation in party systems and electoral volatility").

[50] Setälä says that referendums were handy tools for dictators to boost their legitimacy. They were used to consolidate the Nazis' powers and former communist countries in Eastern Europe. Setälä, *supra* note 1, at 1–2.

[51] Arnold Zurcher, *The Hitler Referenda*, 29 Am. Pol. Sci. Rev. 91, 92 (1935) ("The Nazi adaptors have also made at least one important change of a technical character in the republican regulations governing the operation of the referendum. This is to repeal the former rule that an amendment to the Constitution could not be considered adopted in a referendum unless at least one-half of the registered voters had endorsed it. In the new Reich, a simple majority of the participants are competent to decide").

[52] *Id.*

[53] Tierney, *supra* note 7, at 278.

the referendums in Cyprus and Northern Ireland to demonstrate these dangers and compares the degree of buy-in among different constituencies. It was essential to the success of Northern Ireland, she argues, and fatal to the process in Cyprus, that the process was not seen as equally legitimate across the community.[54] In the referendum that ratified the peace agreement, by contrast, the turnout was incredibly high. There was an agreement across constituencies in Northern Ireland and a majority in the referendums held in Ireland and Northern Ireland. Indeed, requiring a majority across different communities gives better effect to the principles of majoritarianism: impartiality across outcomes. Imagine a scenario where a country has 49% of a population, of which 49% speak language A and 51% speak language B. The country holds a referendum on a new constitution abolishing rights for language A which results in 51% support for the new constitution and 49% against it.[55] It is misleading to say this outcome is impartial as between individuals and alternatives. The built-in language majority leads to disproportionate power for some community members at the expense of others. Special majority requirements are ways of ensuring that outcomes respect the rights of minorities. 50 + 1 approaches do not address disagreement in a way that those who disagree with an outcome have a reason to agree with. These indirect reasons to support outcomes that a voter does not support are the foundation of democratic legitimacy.[56]

Consociationalism in referendums is closely connected to special majority requirements. If referendums are to achieve their objective, it is necessary to ask "a majority of whom?" Requiring agreement across minority groups and communities helps ensure that referendums have achieved their purpose of achieving broad legitimacy across populations. A winner-takes-all approach to majoritarianism is likely to do more harm than good in this scenario. Even with special majority requirements, voting is only a small part of the referendum process; it cannot create the will to agreement where none exists.[57] This section sought only to make two points about the relationship between consociationalism, referendums, and special majority requirements. First, there are additional reasons to use special majority requirements under circumstances of consociationalism. Second, the use of these requirements better supports the aims of majoritarianism. When making a case for majoritarianism, to be impartial as between outcomes, it is always necessary to ask: "a majority of whom?"

7.3. Alternatives

There are alternative methods to achieve the same objectives, such as compulsory voting or limiting options in referendums. Special majority requirements are superior to both options. They are superior to compulsory voting insofar as they do not

[54] Joana Amaral, Making Peace with Referendums 170 (2019).

[55] That is to say, in these circumstances the "decisional" and the "topical" minority are the same. Waldron, *supra* note 28, at 1397.

[56] This is how Wollheim addresses the paradox of democracy. Richard Wollheim, *A Paradox in the Theory of Democracy*, *in* Philosophy, Politics, and Society 71 (Donald Weiss, Peter Laslett. & W.G. Runciman eds., 1962).

[57] Tierney, *supra* note 7, at 247.

provide any kind of sanction or coercion to people who may wish to opt out. In this way, they offer a lighter-touch way of achieving the same end: ensuring a wide degree of participation to make changes to the status quo. Special majority requirements are also preferable to limiting the ballots to two options. Sometimes, it is necessary to consider multiple possibilities—particularly when multiple votes are held on a single question. This leaves open the possibility of considering a range of options. On both the alternative possibilities—compulsory voting and binary choices—special majority requirements offer both a lighter touch and a more effective solution to the challenges of entrenching constitutional change.

7.4. The dangers of demandingness

A reader might be concerned that using special majority requirements sets the degree of agreement required for constitutions too high. Constitutions are, of course, not only sites of agreement. They play an equally important role, Barber argues, as sites of disagreement. They are mechanisms of constructive ambiguity and muddling through.[58] Relatedly, the case for supermajorities here might be setting the standard for agreement too high. This worry about demandingness is an important one. It is right to say that constitutions are about a disagreement, or agreement to disagree. Complete consensus is neither necessary nor desirable as a goal. The aim of special majority requirements is not to achieve absolute agreement. Their aim is only to give effect to the principles of majoritarianism—to make sure a majority does, in fact, support propositions. Yes, special majority requirements make constitutional change more burdensome. This proposal aims not to make constitutional change impossible but rather to ensure that the level of burdensomeness is appropriate to the significance of referendums themselves and to maximize participation and ensure equal status and standing amongst all groups. These objectives have salience in the context of constitutional change, particularly in deeply divided societies where consociationalism is required. This may result in constitutional change being established on a narrower, piecemeal basis where a supermajority can be established across communities. Even if more limited, however, that is a far better and more durable path to constitutional change. One final serious concern with the use of special majority requirements remains, however, if not 50%+1, why not 60%+1 or 70%? What is special about specific special majority requirements?

8. The indeterminacy and arbitrariness of special majority requirements: A response to Schwartzberg

The most serious challenge to special majority requirements for referendums on constitutional issues is advanced by Schwartzberg.[59] Schwartzberg argues that

[58] Nick Barber, *Against a Written Constitution*, 2008 Pub. L. 11, 16.

[59] Melissa Schwartzberg, Counting the Many: The Origins and Limits of Supermajority Rule chs. 6, 7 (2013). Schwartzberg is offering her critique in the case of constitutional amendment specifically, but her concern is relevant to all the referendums at issue here.

supermajority rules' indeterminacy and arbitrariness undermines their defensibility as processes of constitutional amendment. These special majority rules are indeterminate insofar as they offer a range of rules ranging from 50 + 1 to anything less than 100% agreement. For Schwartzberg, this indeterminacy is challenging since, though there may be strong reasons for using supermajority rules generally, these reasons are not strong enough to support specific supermajority rules over other supermajority rules. Thus, though there may be strong reasons for using a 4/7 rule, a 3/5 rule, a 2/3 rule, or a 3/4 rule to amend a constitution, these reasons are not strong enough to prefer, say, a 2/3 rule over its competitors.

This indeterminacy is especially challenging, Schwartzberg argues, when there are distributive inequalities that cannot be easily changed due to a specific supermajority rule (e.g. an indigenous group cannot have its language). In these cases, the losing group may ask: "why is this the supermajority threshold rather than a lower one?" And since the arguments for these rules only support the use of such rules in general, not in particular, there is no response to this reply.

Schwartzberg is entirely right to say that special majority requirements are indeterminate. It does not follow from the indeterminacy of such rules, however, that there is no case for them. The question should instead be a test posed in terms of the requirements of formal equality on which majoritarianism is based. Does this rule either prevent or enable equal success and standing? That will be a contingent, rather than a context-independent, question. So, in the language-rights case identified above, such a supermajority rule preventing constitutional change is not defensible if it does not afford equal status and standing to a particular group, particularly as compared to similarly situated linguistic minorities. To use another example, if some American states had more votes than others in the Senate because of how many university graduates lived there relative to other states, that would be problematic. However, the fact that smaller states have the same number of votes as those with a larger population is a way of maintaining formal equality, particularly in conjunction with the representation by population in the House of Representatives. This is all to say: the matter of what satisfies equal status or standing must be assessed evaluatively depending on the context. Because the requirements even to establish formal equality vary depending on the context, country, and question, the special majority requirements used must vary as well. That these requirements of formal equality vary does not undermine the necessity of their use for binding matters of constitutional change. It means only that such requirements are, at least in part, context-dependent.

9. Conclusion

Concerns with the use of referendums broadly fall into two schools of thought. On the first, referendums are *too* democratic. That is to say; they offer too much power to ordinary voters in indefensible ways. On this view, referendums undermine representative democracy by giving effect to bare majoritarianism.[60] The other end of

[60] John Haskell, Direct Democracy or Representative Government? Dispelling the Populist Myth (2000).

the spectrum argues that referendums are not democratic *enough*. Because of the agenda-setting power of elites, referendums *cannot* give effect to majoritarianism.[61] This article is not advocating either of these ways of thinking about referendums. The aim of these proposals is not to limit the disruptive power of majoritarianism, or to deny the importance of majoritarianism. This article aimed to interrogate the meaning of majoritarianism in the context of referendums. It argued that a definition of majoritarianism as "more votes than the other" is not the best way to give effect to the underlying principles of majoritarianism, impartiality as between outcomes. As a contextual matter, it is potentially the case that simple majoritarianism may be impartial between individuals and alternatives. This is not, however, necessarily, automatically, or conceptually the case. A 50%+1 approach does not automatically give effect to formal equality and fairness. The meaning of a majority is context-specific and normative; it is not conceptual and descriptive.

There are features of special majority requirements that are particularly helpful in referendums. The irreversibility and all-or-nothing character of referendums make special majority requirements especially important. Specifically, this article has argued that (i) there is always a case for turnout thresholds in referendums, and (ii) there are further arguments for special majority requirements, particularly in deeply divided societies as part of the process of consociationalism, but it will depend on the context. This will require getting into technical detail and making evaluative judgements about what equality of standing and status requires. These context-dependent questions of technical detail are enormously important. Special majority requirements are used worldwide, although not nearly enough, and their technical applications must be reconsidered in a range of contexts. The technical nature of setting special majority requirements in particular circumstances should not deter constitutional lawyers and theorists from thinking hard about their use. As Ortega y Gasset rightly argues, "The health of democracies, of whatever type or range, depends on wretched technical detail . . . all else is secondary."[62]

[61] Benjamin Barber, Strong Democracy: Participatory Politics for a New Age 261 (1984).
[62] José Ortega y Gasset, The Revolt of the Masses 158 (Anthony Kerrigan trans., W.W. Norton 1994).